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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

TAT CAPITAL PARTNERS LTD., et. al., Plaintiffs and Respondents, v. DAVID FELDMAN, et. al., Defendants and Appellants.	H035968 (Santa Clara County Super. Ct. No. CV035531)

In this appeal we address several procedural issues raised by defendants ZF Micro Solutions (Solutions); its principal, David Feldman; and a number of individual investors in Solutions. Appellants contend that the trial court deprived Solutions of a jury trial on every element of breach of contract in consolidated actions brought by plaintiffs TAT Capital Partners, Ltd. (TAT), Sands Brothers Venture Capital LLC, and SB New Paradigm Associates LLC. Appellants further argue that the court failed to find that TAT lacked standing to prosecute the action, essentially directed a verdict on the jury portion of the trial, and impermissibly severed Solutions' cross-complaint against TAT. As to the individual defendants, appellants contend that the court violated Civil Code section 3439.08, subdivision (b), by imposing more than $9 million in damages on them for being "fraudulent transferees" even though the amounts claimed by plaintiffs totaled only $6.7 million. Finally, appellants assert a deprivation of Feldman's due process rights

arising from the court's exclusion of him from the courtroom and subsequently from the areas through which the jurors would pass. We find no error, however, and therefore must affirm the judgment.

Background[1]

The Parties

Appellant Solutions is the successor company to ZF Micro Devices (Devices), which had contracted with National Semiconductor Corporation (NSC) to produce the embedded "ZFx86" microchip. Appellant David Feldman, the founder and chief executive officer (CEO) of Devices, also started Solutions and was its president and CEO.

Plaintiff TAT represents itself as a venture capital firm formerly known as TAT Investment Advisory Ltd., a private equity firm investing in startup technology companies. It was a Swiss company with an American manager, Mark Putney, who resided in California.[2] Sands Brothers Venture Capital LLC (Sands Venture) and SB

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[1] In relating the history of this dispute, we disregard much of the statement of facts in Sands' brief, as it describes many events with no citation to the record whatsoever, or at best to the trial court's statement of decision. Given this voluminous record, we expect the parties to comply with California Rules of Court, rule 8.204(a)(1)(C) by supporting "*any* reference to a matter in the record by a citation to the volume and page number of the record where the matter appears." (Italics added.) This rule is intended to require the parties on appeal "to direct the appellate court to evidence in the record . . . . And the trial court's explanation of its decision—whether by order, statement of decision, judgment, oral pronouncement, or other form—is not evidence. Factual assertions on appeal cannot rest solely on citations to the decision of the trial court. It is the evidence supporting or opposing the trial court's decision that is important. . . . Because '[t]here is no duty on this court to search the record for evidence' [citation], an appellate court may disregard any factual contention not supported by a proper citation to the record." (*Grant-Burton v. Covenant Care, Inc.* (2002) 99 Cal.App.4th 1361, 1378-1379 [italics omitted].)

[2] According to Putney, TAT Advisory Limited was the "advisory" firm for TAT Capital Partners Ltd. Putney was a partner of only TAT Capital Partners.

New Paradigm Associates LLC (collectively, "Sands") were also venture capital firms based in New York. TAT held 21.7 percent of the shares in Devices; the Sands entities together owned 10.4 percent.

On February 28, 2002, as a consequence of Devices' default on a loan by Gary Kennedy, a Devices investor, Kennedy foreclosed and Devices ceased its operations. Kennedy sold the Devices assets he had acquired to Solutions, which Feldman had started a month earlier. Feldman and his sister, Marsha Armstrong, loaned nearly $400,000 to Solutions for the purchase of the Devices assets. Included in this assignment of assets was the chip production agreement between Devices and NSC.

The NSC Litigation

On April 25, 2002 Solutions sued NSC on several grounds, including NSC's failure to produce chips for Solutions in accordance with the contract NSC had with Devices. On May 28, 2002, NSC filed a cross-complaint against both Devices and Solutions (as successor) for failure to pay for chips it had produced and sent to Devices in accordance with the same contract. NSC filed a first amended cross-complaint one year later, on April 25, 2003, asserting new causes of action against the cross-defendants, including breach of fiduciary duty and fraudulent transfer of assets from Devices to Solutions.

On March 11, 2004 Feldman sent a letter to the shareholders of Devices, noting that he had bought "certain of the assets" of Devices and "recast the company" as Solutions. Among the purchased assets, he noted, was the right to pursue the action against NSC. In order for the new company to continue, however, it needed an additional $500,000 beyond the $1 million it had secured through cash investment and product sales. Toward this end Feldman asked the shareholders to consider investing an amount equal to $.02 per share of their original investment in Devices. As an incentive, he offered a "Series of Preferred Stock with a redemption for 10 times the amount of your investment in New ZF [i.e. Solutions]. Funds for both the payment of this liquidation

preference and for the continuation of ZF are expected to come from the results of the litigation with [NSC]." Feldman added that he expected the litigation to culminate eventually in damages that would "greatly exceed the the [*sic*] net amount after litigation costs needed to meet the liquidation preference." At trial Feldman explained that "litigation preference" meant "the 10x return," and "litigation costs" meant "everything that it was going to take to keep the company alive. To pay for expert witnesses. To pay the litigation funding companies. To pay the 10x return, etc."

A number of Devices shareholders responded to this invitation and signed the "ZF Micro Solutions, Inc. Series B Stock Purchase Agreement." TAT and Sands, however, did not. Many of those who did sign were later named in plaintiffs' lawsuit and have been referred to variously as the Series B investors, transferee defendants, and individually named defendants.

One of the issues that arose in the NSC litigation was whether Solutions had standing to assert tort claims against NSC. NSC maintained that those claims belonged exclusively to the shareholders of Devices. In response, Feldman produced a separate document purporting to transfer all intellectual property related to the ZFx86 chip from Devices to Solutions, including "any claims" against NSC arising from the production agreement. This "Assignment of Assets" bore no date of signature but denoted March 1, 2002 as its effective date.

NSC, however, disputed the effectiveness of this document. On April 10, 2004 Feldman wrote to the Devices shareholders, asking them to ratify his transfer of Devices' legal rights against NSC to Solutions. The attached document, titled "Action by Unanimous Written Consent in Lieu of Meeting of Board of Directors of ZF Micro Devices, Inc., A California Corporation," prefaced its resolution by representing that the shareholders wanted Solutions to pursue the claims against NSC and that they wished "to eliminate any questions surrounding the corporate formalities surrounding the transfer of the Causes of Action from this corporation to Solutions." As the court later pointed out,

however, neither this "Consent Agreement" nor the April 10 letter referred to the Series B investors' prospective recovery of a portion of the anticipated recovery from NSC. At most the Consent Agreement offered an acknowledgment that "the directors [of Devices] understand [that] Solutions made agreements with each of the shareholders and creditors, excluding National Semiconductor Corporation, for payment of a portion of the proceeds of any judgment resulting from the Causes of Action [against NSC]."

Howard Sterling, the chief operating officer of Sands Venture, signed the Consent Agreement and returned it on April 14, 2004. Sterling testified at trial that he signed the agreement after receiving oral assurances from Feldman that Solutions was expected to recover "a lot of money. And after costs and expenses, which [Sterling] understood as basically the lawyers and litigation-related expenses were paid, the shareholders would be paid pro rata." Sterling "especially understood that the quid pro quo for giving our consent was validating that fair, just, and historical the way it was agreement [*sic*]."

Putney received his copy of both the Consent Agreement and the April 10 letter by e-mail from Feldman on April 11, 2004. On Tuesday, April 13, 2004, he forwarded the e-mail and attachments to his TAT co-worker and fellow manager, Thomas Egolf, who replied the same day. Egolf suggested to Putney that they ask for a "clear specification of the distribution of the proceeds. It now reads that Solutions made [an] agreement with the undersigned shareholders, but we have not seen anything like this. If this issue is not clear we will certainly not sign this."

Putney then informed Feldman that TAT would not sign "until a clear understanding is given with regards [*sic*] to distribution of proceeds in the event of an award." Feldman replied on April 17 with the following clarification: "TAT will be treated the same as all ZF Micro Devices shareholders. The distribution plan in the event of an award or settlement is as follows: Legal expenses and associated costs must be paid first. Then there will be pro-rata distribution of the remainder to the creditors, followed by the return promised to those investors in ZF Micro Solutions who invested after the

March 11, 2004 letter, followed by a pro-rata distribution to all shareholders of record in ZF Micro Devices as of the February 28, 2004 [*sic*] foreclosure by the Kennedy Trust."

On Friday, April 23, 2004, Feldman sent another e-mail to Putney in response to "your voicemail." He asked Putney for "an example . . . of exactly what TAT is looking for in writing." He emphasized the urgency of a resolution, as a hearing on an issue related to NSC's standing challenge—a "Motion to Separately Try Issue re Proper Plaintiff"-- was to take place the following Tuesday, and it was "important to show the judge that there is agreement by all."

Egolf was on vacation, but Putney responded that day by suggesting that Feldman provide "a detail [*sic*] in writing of distribution taking into account all that has evolved with the transfer of assets, creditors (amount owed), where new money sits and ultimately where TAT would be (percentage of equity) in the event of distribution. That, with a cap[italization] table would be a good start." Feldman replied two hours later: "I asked Trepel Law to prepare a letter which I have signed and attached that reiterates what I told you on the phone. Additionally, I am attaching the Declaration I submitted to the court which also confirms *the intention to do the pro-rata distribution after expenses and litigation costs.*" (Italics added.) Feldman suggested a meeting to go over all of the information Putney was requesting and provide anything else TAT needed.[3]

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[3] In his deposition testimony, which was read during the first phase of the trial, Feldman admitted, "The agreement [with TAT] was that, after all the costs were paid that if there was anything remaining, it would be distributed based on percentage ownership in the company. Equal treatment." Feldman also recalled a conversation with Putney, who was asking for details of the planned distribution. Feldman testified that his response was "that there was no way that I could commit to any specifics because, other than what we [had] already discussed, which was the distribution, would be based on—on the percentage of ownership in the company. But beyond that, that I had no idea what the cost of litigation would be, or . . . whether it would be appealed, and all of those things. . . . I had no detail about any of those. So I said I couldn't give him any specifics." Feldman also explained his view of "pro rata": "That—anything that remains that went to

The letter to which Feldman referred was written by Feldman, not the Trepel law firm, but Anthony Trepel, Solutions' attorney, did review it before it was sent to Putney. Signed by Feldman, the letter stated: "It is my intention to treat TAT Capital Partners the same as all other shareholders of ZF Micro Devices ('ZFMD'), should ZFMD or ZF Micro Solutions ('ZFMS') prevail in the litigation against NSC. Specifically, I intend to share, pro-rata, the recovery (after deduction of attorneys fees and litigation costs) *first with ZFMD's creditors and then with ZFMD's shareholders*. I enclose a copy of a declaration, previously submitted to the Court, which states this." (Italics added.) Putney understood this letter to mean, contrary to the version in the April 17 e-mail, that now the Solutions shareholders were to be paid *after* the Devices shareholders. That difference was important to Putney because TAT, while it had $9.8 million invested in Devices, owned no shares in Solutions, "so we weren't going to give a ratification for nothing." Thus, considering TAT's duty to its own investors, Putney wanted to make "very well sure" that Devices would be paid first.

The declaration referred to in Feldman's April 23 e-mail and letter had been submitted to the court in the NSC litigation on April 20. In that declaration Feldman stated: "It is my intention to pay ZFMD creditors and shareholders a pro-rata portion of any recovery from NSC from available funds (after deduction of certain costs and expenses) after trial or settlement." Feldman represented to the court that he had already obtained approval of the disputed assignment from 85-87 percent of Devices shareholders, and he attached the signature pages from three consenting shareholders. He further stated that he had been "promised" approval from additional shareholders, which would bring the total to 90 percent in time for the April 27 hearing on NSC's motion for a separate trial on the "proper plaintiff." NSC disputed the approval percentages asserted

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[Devices] would be distributed pro rata based on share ownership to each shareholder of Devices."

by Feldman by pointing out that Putney had not agreed to the proposal and that the three shareholders whose consent had been obtained (to an unspecified document) accounted for only 28.6 percent, not 85-87 percent.[4]

On Monday, April 26, 2004 (the day before the NSC hearing) Putney authorized Maarten Robberts to sign the "Action by Shareholders" ratifying the assignment of the NSC litigation from Devices to Solutions. Robberts faxed the signed consent the next day. At the April 27 hearing on NSC's motion Solutions represented to the court that more than 90 percent of the Devices shareholders had consented to the assignment of the claim against NSC. Feldman testified to the same fact during his deposition in the present action.

On June 15, 2004 Feldman sent e-mail to the Devices shareholders to announce that the jury had reached a favorable verdict in the NSC litigation the previous day. Feldman warned the investors, however, that the award was less than $29 million, and "legal expenses, creditors and other costs" could exceed 50 percent of the total. Putney responded to the e-mail, "Dave, does this mean that TAT will share prorata $15M?" Feldman did not respond directly to the assumption behind Putney's message, but only told Putney that NSC intended to appeal so "they could be looking at another two years." In a June 25 meeting between him and Putney, however, Feldman outlined the next steps in the NSC proceedings and sketched out TAT's expected recovery of $2.9 million.[5]

On August 24, 2004, Feldman notified the shareholders that the court had ordered a new trial upon NSC's motion.

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[4] The court denied NSC's motion without prejudice, so as "not . . . to bind the trial judge in terms of the order of proof or how . . . to order the evidence in this case."

[5] According to Putney's trial testimony, "[Feldman] proceeded to put down the award on the white board. 29 million approximately. And then just taking the math of the litigation costs, and so forth. He put the subtracted number at roughly about 14 and a half million dollars. And put TAT's cut of that at about 2.9 million."

On September 27, 2004, Feldman solicited additional investment from Devices and Solutions shareholders to fund the new trial. He requested $.04 times the number of shares held in Devices, with a promise of "Series C Preferred Stock" with a redemption right of four times the amount of the shareholder's investment in Solutions. After costs and legal fees were paid, the proceeds would be distributed to Series B and Series C investors, followed by "a pro-rata distribution of the balance to the shareholders and creditors." Feldman elaborated on this sequence in an October 2004 letter, which added the details of the anticipated litigation costs and explained that Series B investors would be paid before Series C investors, and any remaining funds would be used to repay Devices investors and creditors. In November, however, Feldman advised shareholders of both companies that instead of implementing the Series C plan, Devices would extend the Series B offer, thereby promising the same "10x return" as the existing Series B investors. Feldman renewed this invitation on December 14, 2004. Putney, however, conveyed to Feldman the lack of interest in investing from TAT and its shareholders. Sands likewise did not avail itself of this opportunity.

On December 31, 2004, Feldman informed the shareholders that a settlement had been reached with NSC, but the amount Solutions would receive was "far less than we had hoped for and will not yield enough net of all legal fees, litigation costs, and ZF Micro Solutions Series B repayment commitments to provide any return on the investments made in ZF Micro Devices." [6]

Putney asked for a detailed accounting of the distributions planned for the $20 million settlement. Feldman did not respond to this request. TAT's attorney repeated the

[6] In addition to the settlement amount of $20 million, Solutions was to receive a perpetual royalty-free license for a large portion of NSC's intellectual property in the ZFx86 chip. NSC further agreed to forgive a debt of $1.1 million that it had claimed Devices owed it.

request in January 2005, but Feldman was not "able" to provide the accounting until this lawsuit was brought.[7]

The Pleadings in This Action

On February 14, 2005, TAT and Sands jointly sued Feldman, Devices, and Solutions, seeking dissolution of Devices and an accounting, as well as compensatory and punitive damages for breach of fiduciary duty and fraudulent transfer. The operative complaints at trial, however, were respondents' separate pleadings: TAT's second amended complaint and Sands' fourth amended complaint. TAT pleaded breach of contract against Solutions and three causes of action against the individual defendants for fraudulent transfer. Sands alleged breach of contract, breach of contract as a third party beneficiary of the TAT-Solutions agreement, and promissory estoppel against Solutions, as well as the same three causes of action for fraudulent transfer against the individual defendants.

In its contract cause of action, TAT alleged that it had signed the Consent Agreement in reliance on, and in consideration for, promises Feldman had made in the April 17 e-mail and the April 23 e-mail and letter. Sands, on the other hand, asserted that before Sterling signed the April 2004 Consent Agreement, Feldman *orally* promised him that if Sands ratified the assignment from Devices to Solutions, Sands "would be treated the same as all other shareholders of Devices and that any recovery [from NSC], after deduction of attorneys' fees and litigation costs, would be shared pro-rata, first with the creditors of Devices and then with the Devices shareholders." Sterling signed the Consent Agreement in reliance on that promise, thus creating a contract and the basis of promissory estoppel. Sands further alleged that it was the third-party beneficiary of the

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[7] An exhibit identified at trial, but apparently not admitted, indicated that of the $20 million, $5 million went to attorney fees, $1.32 million to "Litigation Costs" and $9.975 million in "Damage Payments" to numerous individuals, including the individually named defendants.

pro-rata agreement between Solutions and TAT, because Sands was "a member of the class intended to benefit from the TAT Pro Rata Agreement." Both plaintiffs accused the individual defendants of fraudulent transfer within the meaning of Civil Code section 3439.04, subdivisions (a)(1) and (a)(2)(A), and section 3439.05.

Devices and Solutions were permitted to file a cross-complaint against TAT. Their first amended cross-complaint, deemed the operative complaint in October 2009,[8] eventually asserted one cause of action, for breach of fiduciary duty in the course of Putney's and Egolf's service on the Devices board of directors.

The parties engaged in extensive pre-trial litigation over the action and cross-action, including injunction requests, motions to strike, demurrers, a plea in abatement, and summary adjudication motions. Among those procedural digressions was a motion, which the court granted, to sever the first amended cross-complaint and consolidate it with a separate pending action. Finally, trial before the Honorable Carrie Zepeda began on January 5, 2010, just short of five years after the initial complaint was filed.

The Trial

Among the numerous motions in limine was defendant's request that the trial be divided into three phases: a bench trial to determine plaintiffs' standing to bring the lawsuit; a bench trial to determine "whether the terms of the alleged contract at issue are sufficiently definite to create an enforceable contract"; and a jury trial on "Plaintiffs' promissory estoppel and fraudulent transfer claims and Defendants' cross-claim for breach of fiduciary duty." The court granted defendants' motion in part. The requested first phase was moot, because the court had already granted TAT's motion in limine to preclude evidence on this issue. Defendants' requested second phase, however, was accepted by the court, over TAT's objection: The court announced that it would

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[8] A second amended complaint had been filed in August 2009, but it was withdrawn by stipulation on October 20, 2009.

determine whether the "pro rata agreement" was "a valid contract" or vague and therefore unenforceable. The court rejected TAT's argument that the issue had already been determined by the ruling on a prior demurrer, because that ruling merely pertained to the sufficiency of the pleadings; there could still be evidence relevant to the vagueness issue.[9] The third phase was conducted solely on the allegations of fraudulent transfer; the additional request to include the cross-complaint in phase three was denied, because the court had already severed this pleading and consolidated it with the separate action.

The trial on phase one took place over several days between early January and late February of 2010. At the conclusion of this part, the court found that a contract did exist between Solutions and TAT and between Solutions and Sands, and that those contracts were sufficiently definite to be enforced. In its tentative decision the court initially noted that it had been "asked to determine whether a contract was formed between the parties." The court then stated that "as there was no material conflict in the extrinsic evidence related to the contract, the court will also set forth the terms of the agreement between the parties." Specifically, Solutions agreed to "pay [TAT], in exchange for the execution of the Consent Agreement, 21.7% of any recovery either by settlement or judgment of the NSC Lawsuit after deduction of attorneys' fees paid by Solutions to its attorneys in the NSC Lawsuit and litigation costs in the NSC Lawsuit."[10] The court made the same

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[9] Defendants had demurred to TAT's original complaint with respect to its second cause of action for breach of fiduciary duty, based in part on their argument that the alleged agreement was too uncertain to be enforced. Defendants made the same argument in an unsuccessful anti-SLAPP motion under Code of Civil Procedure section 425.16. The first demurrer was sustained without leave to amend; following amendment of TAT's complaint, defendants again demurred, this time including the first cause of action for breach of contract. Defendants again asserted that the alleged contract was too vague to be enforced. In its partial overruling of this demurrer the court expressed the view that "there is enough there for breach of contract as well as fraudulent transfer."

[10] The court based its conclusion on the discussions between Feldman and Sterling, and on Feldman's written representations, "including but not limited to" his April 20

finding as to Sands except that the percentage promised to Sands was 10.7 percent.[11] Before the jury began hearing the case, the parties corrected this figure and stipulated that TAT was said to control 21.7 percent of Devices; the two Sands entities together owned 10.4 percent.

On April 14, 2010, the court gave the jury its initial instructions for phases two and three. The court advised the jurors that it had already tried a portion of the case and found that a contract existed between plaintiffs and Solutions: "The contract between the parties provided that in exchange for signing a consent agreement TAT Capital Partners, Sands Brothers Venture Capital, and SB New Paradigm Associates would receive a pro rata share of any recovery from the National Semiconductor litigation, after deduction of attorneys' fees and litigation costs and payment to ZF Micro Devices' creditors." The court also told the jurors that any Devices creditor no longer had any claim for payment because the statute of limitations had expired. The jurors' duty, the court explained, was "to determine whether [Solutions] breached its contract with the plaintiffs. You will also determine whether [Solutions] wrongfully transferred money to the individual defendants. [¶] Finally, you will determine what, if any, damages plaintiff[s] should receive."

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declaration in the NSC lawsuit, his April 23 letter, a declaration by Solutions' attorney in the NSC case confirming an agreement, and the language of the Consent Agreement itself. The court emphasized that the contents of the April 23 letter and the April 20 declaration "demonstrate that costs and expenses mean attorneys' fees and what are commonly considered to be litigation costs. Litigation costs do not include payments to Solutions' shareholders or working capital for Solutions."

[11] The agreement with Sands, according to the court, was that "in exchange for signing the consent Agreement, Devices' shareholders would receive a pro rata share of any recovery from the NSC Lawsuit after deduction of attorneys' fees, litigation costs and payment to Devices' creditors. . . . there was no evidence of any discussion which suggested that Solutions' shareholders would be paid before Devices' shareholders."

On April 20, 2010, the jury found in favor of Sands and TAT on the allegations of breach of contract. On the special verdict form it found that Solutions had failed to perform as required by each contract, and that both Sands and TAT were harmed. Sands was awarded $1,422,469.70, and TAT was awarded $2,968,036.83.

On May 12, 2010, after hearing further testimony, the jury rendered its special verdict on the fraudulent transfer allegations. On the issue of "constructive fraudulent transfer," it found that Solutions had not received from each of the named transferee defendants "a reasonably equivalent value in exchange for the transfer," and that Solutions "was insolvent or became insolvent as a result of [this transfer]," The transfer to each of these 22 defendants was made by Solutions "with the intent to hinder, delay or defraud plaintiffs," and it caused harm to plaintiffs. Addressing the single affirmative defense presented to it, the jury found that each transferee defendant had not accepted the transfer "in good faith and for reasonably equivalent value." The court entered judgment on June 10, 2010, and an amended judgment on August 23, 2010. After unsuccessfully seeking judgment notwithstanding the verdict, vacation or modification of the judgment, and a new trial, Solutions and 20 of the transferee defendants brought this appeal.

Discussion

1. *TAT's Standing*

Before trial the defendants repeatedly raised the issue of TAT's and Sands' standing to prosecute this action. Defendants sought to defeat the action on this ground by motion for summary judgment, by letter to the judge handling pretrial matters, by motion for an order rescinding any "alleged contracts" with plaintiffs, by plea in abatement, and by motion in limine to exclude evidence based on the voidness of any contract. As to TAT, defendants took the position that as a Swiss corporation, it was not permitted to file a lawsuit because it was transacting business in California without registering with the Secretary of State or paying state taxes. The failure to register, defendants argued, in itself "voids the 'contract' and requires abatement of the suit."

Defendants conceded that Sands had registered, but any contract with Solutions was still voidable until Sands could show that it had paid taxes.

In addressing the plea in abatement in January 2008, the Honorable Jack Komar ruled that the motion was procedurally improper. The judge further observed, however, that *if* he were to rule on the merits of the issue, he "would conclude that neither of these plaintiff entities have violated any principle of registration. They are registered. They are not acting in any capacity other than as a shareholder since . . . long before the complaint was filed in this case. At one time there was an issue concerning whether or not they were acting outside their capacity as a shareholder by virtue of being a director. But there is certainly no evidence that that has happened since, apparently, 2001 which is long before this action was filed." Judge Komar commented that this issue was "basically a waste of . . . time and money" for defense counsel and their clients.

During motions in limine, Judge Zepeda denied defendants' second motion in limine to exclude evidence of breach of contract, which defendants had brought on the same ground: the contracts were void because TAT and Sands had transacted business without registering with the state. She granted TAT's seventh motion in limine to exclude evidence related to whether TAT was licensed to transact intrastate business. Judge Zepeda reasoned that Judge Komar had "already decided the issue" with prejudice; but even if the question was, as defendants argued, "still ripe," she agreed with Judge Komar's view of the merits.

On appeal, defendants renew their challenge to TAT's standing to bring this action. They do not pursue their opposition to Sands' right to proceed;[12] consequently, our focus is on TAT only.

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[12] Sands Venture registered with the California Secretary of State in August 2007.

Corporations Code section 2105 prohibits foreign corporations from transacting business in California without having first obtained a "certificate of qualification." (§ 2105, subd. (a).) A corporation that has failed to comply with that provision subjects the corporation to monetary penalties, and it may not "maintain any action or proceeding upon any intrastate business so transacted in any court of this state, commenced prior to compliance with Section 2105, until it has complied with the provisions thereof." It also must pay an additional penalty along with fees and taxes for the period in which it was transacting intrastate business. (Corp. Code, § 2203, subds. (a), (c).)

"Transacting intrastate business" is defined in Corporations Code section 191, subdivision (a), as "entering into repeated and successive transactions of its business in this state, other than interstate or foreign commerce." Appellants maintain that TAT was transacting business because its officer, Mark Putney, maintained an office at his home in California, received a salary out of TAT's management fee, and actively served on the board of directors for Devices until 2001.[13]

These facts are insufficient to bar TAT from the litigation. Subdivisions (b) and (c) of Corporations Code section 191 exclude from the definition of "transacting intrastate business" a foreign corporation's status as a shareholder of a domestic corporation, its act of maintaining a lawsuit, and "[h]olding meetings of its board or shareholders or carrying on other activities concerning its internal affairs." (Corp. Code, § 191, subds. (b)(1), (c)(1), (c)(2).) Neither Putney's activities related to TAT's internal affairs nor his use of his residence to carry out those activities was sufficient to constitute transacting business by TAT within California.

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[13] Putney testified in his deposition that he was a partner in TAT Advisory Limited, which was the direct investor in Devices. Putney used his home address as the physical location for TAT. TAT had a representative serving on the board of directors for each of the seven companies in which it invested, including Putney as a board director for Surface Interface, another California-based entity.

2. The Court's Verdict on the Enforceability of the Contracts

Appellants' primary argument is directed at the court's findings in phase one of the trial, in which it determined that a contract existed between Solutions and TAT and between Solutions and Sands, and that those contracts were sufficiently definite to be enforced. Appellants specifically contend that the trial court denied Solutions its constitutional right to a jury trial on plaintiffs' cause of action for breach of contract, the only claim for damages against the entity. (Cal. Const. art I, § 16.) The only ways to waive that right, appellants argue, are the acts described in Code of Civil Procedure section 631, subdivision (d), none of which occurred in this case.[14] "At most," the parties agreed to a court determination of "a single affirmative defense— whether the terms of the purported agreement were too vague/uncertain to be enforced." Instead, the court surprised defendants when it took away Solutions' right to a jury trial and "proceeded to decide, literally, everything she could think of related to the 'breach of contract' claim except . . . performance of the arithmetic to arrive at each plaintiff's dollar value recovery."

A fair reading of the record, however, defeats this argument. Defendants' motion in limine No. 1, to phase the trial, indicated that the second phase (if plaintiffs were determined to have standing to proceed) would "be reserved for *the adjudication of Plaintiffs' contract claims*. In this phase, the Court would be asked to determine whether

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[14] This provision states: "(d) A party waives trial by jury in any of the following ways: [¶] (1) By failing to appear at the trial. [¶] (2) By written consent filed with the clerk or judge. [¶] (3) By oral consent, in open court, entered in the minutes. [¶] (4) By failing to announce that a jury is required, at the time the cause is first set for trial, if it is set upon notice or stipulation, or within five days after notice of setting if it is set without notice or stipulation. [¶] (5) By failing to deposit with the clerk, or judge, advance jury fees as provided in subdivision (b). [¶] (6) By failing to deposit with the clerk or judge, at the beginning of the second and each succeeding day's session, the sum provided in subdivision (c)."

the terms of the alleged contract are sufficiently definite and clear to create an enforceable, binding contract. Because this is a question of law for the Court, a bench trial is appropriate. . . . *[I]f no contract is found to exist*, Defendants cannot be liable for fraudulent transfer since it cannot be otherwise disputed that they were rightfully entitled to the funds. . . . The parties could then proceed with a jury trial on Defendants' cross-complaint, which includes a single cause of action for breach of fiduciary duty. Alternatively, if the contract issues are not disposed of in the bench trial, TAT's breach of contract claim and Sands' promissory estoppel claims could be tried along with the cross-claim for breach of fiduciary duty. [¶] Phasing the trial in this manner will yield great efficiency by potentially sparing the jury, the Court, and the parties needless weeks of testimony. If it is determined in the early phases that Plaintiffs cannot maintain this action or *that no contract was formed*, then testimony, time and resources will be spared for all involved. Streamlining the issues for the jury in this manner will ultimately alleviate the risk of prejudice to all parties stemming from confusion." (Italics added.)

At the in limine hearing defense counsel argued that the evidence would show "that there was an entirely different understanding. And parol evidence as to the meaning of the terms of that contract is going to be huge in this case. As referenced in our papers Mr. Issa, who is one of the experts for TAT, even commented that he thought that Mr. Putney and Mr. Feldman had two different understandings. [¶] So we believe that there . . . is an abundance of evidence that we intend to put on to show the terms [are] vague and ambiguous as to what the parties' intent was. . . . If you phase that issue on the contract it is at the end of that phase of the trial the Court will have determined whether or not there is a valid, enforceable contract between the parties, *and what the terms are.* And if we add on the percentage issue, what the percentage being claimed, whatever pot of money there might be." (Italics added.)

During further argument in which the parties disputed the effect of Judge Komar's demurrer ruling, defense counsel maintained that by overruling the demurrer the judge

merely found that plaintiffs' assertion of a contract was sufficient for *pleading* purposes. "We dispute that a contract existed . . . and will offer at trial that it was a gratuitous promise on the part of Mr. Feldman, which then parlays into the lack of consideration issue, as well as the meaning of the terms and what his intent and state of mind was. And what Mr. Putney's intent and state of mind was, and how all the parol evidence interplays with that. [¶] Again, if this is phased, then it's no harm, no foul because *it's before the Court, not the jury. It's part of the issue that pertains to whether or not there is a valid, enforceable contract* that has not been adjudicated in our view." In insisting that the demurrer ruling contained "no determination" that the parties had actually reached a contract, defense counsel further stated that whether there was a contract was "an issue of law." The court agreed with defense counsel and adhered to its tentative decision to hold a court trial on the question of whether each alleged agreement constituted "an enforceable contract on vagueness [*sic*]."

When defendants received the court's tentative decision on phase one, they requested a statement of decision. In that request they acknowledged that "the parties agreed and the Court ruled that Phase 1 of the trial would be before the Court without a jury, and it would be limited to (1) *a determination of contract formation* . . . . [¶] The Court stated that the contract formation issue would be *limited* to the existence of an enforceable contract, i.e. *one that was sufficiently certain and not too vague or ambiguous to be enforced*." (Italics added.) Defendants nonetheless protested that "the terms and interpretation of the terms were left for a jury to determine if the case reached Phase II." They complained that they had not waived the right to jury trial "regarding the actual contract terms and interpretation." Yet the issues defendants wanted the court to address in its statement of decision included (1) whether plaintiffs communicated their willingness to enter into a contract, (2) whether that communication contained specific terms, (3) whether Solutions "could have reasonably concluded that a contract with these terms would result if [plaintiffs] accepted the offer," (4) whether plaintiffs proved that

they agreed to the terms of the contract and intended to be bound by them, and (5) whether "a reasonable person would conclude, from the words and conduct of each party," that there was an agreement between plaintiffs and Solutions. In a subsequent post-trial hearing on April 15, 2010, defense counsel acknowledged that the purpose of phase one had been to "determine whether or not there was a contract that could be pursued in a breach of contract claim." His objection was that defendants had not waived a jury trial on "interpretation and breach." Instead, "[t]he parties' stipulation as to what Phase I would encompass, and the waiver of a jury trial, was limited to [the] *contract formation* issue." (Italics added.) The court was to determine "whether a contract existed, and the terms would be left for the jury." Counsel later acknowledged that defendants were "*okay with the fact that you identified the terms. . . . And then the trial is to determine whether or not that was breached*. [¶] And part of that analysis, unless the parties waive their jury, is for the jury to determine what those terms mean, and whether or not the provisions of the contract are going to apply to the breach." (Italics added.) He further explained that defendants were "telling [the jurors that] there is a contract, but it's up to them to . . . determine what it meant. And if what it meant means there was a breach, or not a breach." The court, however, noted that in trying the issue of whether a contract had been formed, it had found only uncontradicted evidence, which allowed it to interpret the contract terms.

The record of the pretrial and post-trial proceedings clearly indicates that the court did not overstep the bounds of the issue it was asked to decide. Whether the court correctly determined that a contract was formed is a question Sands attempts to answer, but we need not address it because the focus of defendants' appeal is on the deprivation of their right to a jury trial, not the substance of the court's ultimate conclusion in phase one. Because the court clearly made its findings in accordance with what it was asked to do, we must conclude that defendants invited any procedural error in the court's determination of the contract-formation issue in phase one of the trial. (See, e.g.,

Mary M. v. City of Los Angeles (1991) 54 Cal.3d 202, 212 ["Under the doctrine of invited error, when a party by its own conduct induces the commission of error, it may not claim on appeal that the judgment should be reversed because of that error"].)

Furthermore, appellants have not demonstrated error in the court's delineation of the contract terms. Appellants are correct that a jury may interpret the language of a contract when the contracting parties' intent depends on the credibility of extrinsic evidence. The credibility determination itself may properly be a jury issue. "Interpretation of a written instrument becomes solely a judicial function only when it is based on the words of the instrument alone, when there is no conflict in the extrinsic evidence, or when a determination was made based on incompetent evidence." (*City of Hope Nat. Medical Center v. Genentech, Inc.* (2008) 43 Cal.4th 375, 395, citing *Parsons v. Bristol Development Co.* (1965) 62 Cal.2d 861, 865 and *Estate of Platt* (1942) 21 Cal.2d 343, 352.)

On the other hand, "[t]he language of a contract is to govern its interpretation, if the language is clear and explicit, and does not involve an absurdity." (Civ. Code, § 1638; see also Civ. Code, § 1639 ["When a contract is reduced to writing, the intention of the parties is to be ascertained from the writing alone, if possible"].) Thus, "[w]hen the contractual language is clear, there is no need to consider extrinsic evidence of the parties' intentions; the clear language of the agreement governs." (*EFund Capital Partners v. Pless* (2007) 150 Cal.App.4th 1311, 1322; see also *TRB Investments, Inc. v. Fireman's Fund Ins. Co.* (2006) 40 Cal.4th 19, 27 [parties' mutual intent "is to be inferred, if possible, solely from the written provisions of the contract"].) Here, the issue to be tried by the court was not the interpretation of ambiguous terms but whether a contract was formed. The court properly determined that issue, as it had been asked to do, by finding that, contrary to defendants' position, the parties had in fact reached a contract when Putney and Sterling signed the Consent Agreement. The court merely set forth the unambiguous terms the parties had reached through their negotiations in April

2004. The court then left the question of breach for the jury, as defendants had requested in their motion in limine.

3. Directed Verdict on Breach

Before the jurors began their deliberations plaintiffs moved for a directed verdict on breach of contract. The court denied the motion, commenting that it had not already decided in phase one whether "portions of the contract" had been "satisfied," nor had phase one determined the first date on which Solutions was obligated to perform its obligations. As noted earlier, however, the court did instruct the jury that a contract had been formed between Solutions and TAT and between Solutions and Sands, which allowed plaintiffs to receive a "pro-rata share of any recovery from the [NSC] litigation after deduction of attorneys' fees and litigation costs and payment to ZF Micro Devices' creditors."

Appellants contend that notwithstanding its formal ruling, the trial court impermissibly directed a verdict on the issue presented to the jury in phase two, whether Solutions *breached* its contracts with Sands and TAT. According to appellants, the court relied on its findings in phase one "to resolve all contract issues and eliminate all defenses," leaving "no room for a jury to decide there was 'no breach' " but only a mathematical computation of each plaintiff's share of the NSC proceeds. In other words, a de facto directed verdict occurred "because the 'evidence' in the form of the court's own decision, and exclusion of all 'defenses,' permitted only one outcome—and that was to be augmented solely by a mathematic computation." Appellants urge this court to overturn the asserted directed verdicts because "the limited 'evidence' that was permitted, construed broadly in *appellants'* favor [citation] establishes that Solutions had no 'contracts' with TAT and Sands, nor did Solutions 'breach' any such contract(s), nor did the Solutions Series B investors become fraudulent transferees by receiving their promised return on their investments."

The first part of appellants' challenge merely revisits their previous contention, that the court should not have determined the contract-formation issues. We have already concluded, however, that the court did not err in deciding whether the alleged contracts existed and on what terms. Whether Solutions *breached* those contracts was not subjected to a directed verdict, but was left to the jury. While it is true that the findings of breach and damages were easily established in phase two, that predictability was the product of the indisputable fact that Solutions did not distribute its recovery according to the contract terms. The specific evidentiary rulings precluding the contradiction of the contract-formation findings were well within the court's discretion. (See *Shaw v. County of Santa Cruz* (2008) 170 Cal.App.4th 229, 281 [trial court's evidentiary rulings are reviewed for abuse of discretion].)

At one point during trial on this cause of action the defense attempted to introduce expert testimony about "whether or not [plaintiffs] get money back from the individually named defendants. That's it. No more. No less." Plaintiffs objected, arguing that the defense was merely trying to impeach the expert on his belief regarding the date the contract was formed, which had already been decided by the jury in determining breach.

The court gave the defense "some leeway" to adduce evidence related to the time payment was due, as long as that evidence did not intrude into the issue of contract formation. Counsel assured the court that "that's all [he] intended to do." But defense counsel further sought to show through examination of the expert that "Solutions was unaware of any contract as part of a good faith defense." Counsel insisted that he was not delving into the issue of contract formation; his focus was instead "whether or not our clients believe that there was a contract or obligation with TAT and Sands. And whether they were aware of that obligation at the time that the money was distributed."

Subsequently the court heard argument on the language of the instructions to be given on fraudulent transfer and the extent to which Feldman could testify regarding his understanding of the parties' relationships. The defense again wanted the jury to

understand that Feldman and Solutions never knew that a contract existed with TAT or Sands. The defense represented that its "narrow focus [was] whether or not there was a good faith belief in the existence or non[-]existence of a contract or obligation to the plaintiffs." The court pointed out, however, that the proper focus was the good faith inherent in the transaction between the individual defendants and Solutions, *not* the contract between Solutions and the plaintiffs. The court thus rejected defense evidence suggesting mutual mistake, waiver by plaintiffs, or plaintiffs' admission by silence. These contract defenses, the court ruled, were irrelevant and misleading to the jury, especially because any belief that there was no contract was based on an incorrect understanding of the law.

Defense counsel responded that the transferee defendants' knowledge of the separate obligations was relevant to whether their own agreements with Solutions were entered into in good faith. He stated that these defendants had testified in their depositions that they had been unaware of the communications between Feldman and Putney or the resulting contract between Solutions and TAT. He wanted to extend this reasoning further to Feldman himself, on the theory that Feldman "didn't know about any contract," and "he believed that he didn't have to pay [plaintiffs] until later, if there was a sufficient recovery. Plaintiffs, however, noted that Solutions was the transferor, not a transferee; thus, good faith was a defense held by the individual defendants, but not by Solutions.

The trial court instructed the jury on fraudulent transfer with CACI Nos. 4200, 4201, 4203, and 4205, and with CACI No. 4207 on the affirmative defense of the transferee defendants' good faith.

During argument in phase three plaintiffs urged the jury to view the transfer to the individual defendants as having been made with the intent to hinder, delay, or defraud TAT and Sands. TAT's counsel portrayed each transferee defendant as "an insider, relative, or business acquaintance or friend" of Feldman, which suggested an intent of

Solutions to defraud TAT. Addressing the affirmative defense, counsel argued that the defendants had not taken the assets from Solutions in good faith and for reasonably equivalent value.[15] Sands' attorney added the suggestion that Feldman was not credible in testifying that he did not think he had an obligation to pay TAT or Sands out of the settlement proceeds because he did not believe he had an agreement to do so. And that lack of credibility, counsel argued, demonstrated an actual intent to defraud TAT and Sands.

To the extent that defendants wanted to prove waiver, mistake, and admission by silence, the court was within its discretion under Evidence Code section 352 to preclude evidence of post-contract discussions to show that these were legally viable defenses to the contract. Defense counsel was correct that the existence of a contract did not dispose of the issue of fraudulent intent in transferring the NSC proceeds to the individual defendants. Feldman was in fact permitted to testify that on April 23, 2004, and later, in June 2004, he did not believe there was a contract between TAT and Solutions. But the court properly made a distinction in the admission of testimony between the *credibility* of Feldman's belief that he had not entered into a contract and his legal conclusion that a contract did not exist. Only the latter was precluded, and the jury was asked to determine whether Feldman was credible when he testified that he did not believe he had an obligation to pay TAT or Sands because he was unaware of the existence of an agreement. Feldman's reasons for that belief would have contradicted the previously established fact that the parties had expressed mutual assent in reaching agreement in April 2004. Appellants offer no specific reasons why the court's restriction of this evidence in phase three constituted an abuse of discretion.

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[15] Appellants do not contest the jury's finding that the transferee defendants did not take Solutions' money "in good faith and for reasonably equivalent value."

4. Order for Separate Trial of the Cross-Complaint

On March 11, 2009 Devices and Solutions were granted leave to file their cross-complaint against TAT. At the same time the trial court agreed to consolidate the entire action with an existing lawsuit brought by Kennedy against Devices, Solutions, and Feldman (1-05-CV035532).[16] In allowing the cross-complaint Judge Komar found that the pleading "arises out of the transactions, circumstances, and occurrences that are at issue in the related actions and it is a mandatory cross-complaint." Accordingly, on March 16, 2009 Devices and Solutions filed the cross-complaint against TAT, alleging breach of fiduciary duty, negligent and intentional interference with prospective economic advantage, and conspiracy to destabilize the management of Devices and take control of the company.

That pleading, however, was filed during the pendency of yet another separate lawsuit (1-09-CV-134970), with identical causes of action, brought by Devices and Solutions against TAT, Putney, and Egolf on February 17, 2009. On March 24, 2009, Devices and Solutions dismissed TAT from the claim of breach of fiduciary duty in the separate action. The conspiracy claims were subsequently removed from both the second amended complaint against Putney[17] and (by demurrer) the first amended cross-complaint against TAT. Ultimately only one claim, for breach of fiduciary duty, remained in the cross-action.

Thus, by December 21, 2009, when Judge Zepeda was considering the motion to order separate trials, the causes of action in the operative cross-complaint had been reduced to a single cause of action for breach of fiduciary duty against TAT. The court

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[16] According to appellants, the related Kennedy litigation subsequently settled.

[17] Apparently Devices and Solutions dismissed Egolf from the lawsuit and did not name him in the second amended complaint, but they neglected to delete him from the accusation in the heading for the sole cause of action.

expressed the view that this claim and the main action were not related "at all": The plaintiffs' complaint was "merely the pro rata agreement. And if the shareholders of Devices should have been paid part of the settlement proceeds from the NSC action. And the cross-complaint has to do with how the company was run when it was still in existence, and if there was any breach of fiduciary duties." The court noted that while the same entities were involved, not all of the parties were the same in the two pleadings, and the alleged breach of the fiduciary duty took place before even the NSC lawsuit was initiated. "It has nothing to do with whether or not there is a pro rata agreement between Solutions and [the Devices] shareholders . . . I just don't see that." Accordingly, the court decided to "sever" the first amended cross-complaint and consolidate it with the separate action in 1-09-CV-134970.[18]

Appellants now argue in essence that Judge Zepeda should have ruled consistently with Judge Komar's view of the action and cross-action—that is, by confirming that the first amended cross-complaint "arises out of the transactions, circumstances, and occurrences that are at issue in the related actions and it is a mandatory cross-complaint." Appellants concede that an order for separate trials is a matter left to the discretion of the trial court; they suggest, however, that such discretion is abused when the separate trial will occur in another lawsuit before different juries. By indulging in this "evil," the trial court "removed any possibility [that] Solutions could recover against TAT or obtain any set-off against the 'contract' damages TAT sought to impose against Solutions."

A trial court may order a separate trial of any cause of action asserted in a cross-complaint "in furtherance of convenience or to avoid prejudice, or when separate trials

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[18] In conjunction with this ruling, the court granted a related motion in limine to preclude evidence or argument about the affirmative defense of unclean hands because this was a defense that could be asserted only by Devices, not by Solutions. Together with its ruling on the severance request, the court found the defense to be inapplicable, since the complaint and cross-complaint were not related.

will be conducive to expedition and economy." (Code Civ. Proc., § 1048, subd. (b).) We will not interfere with the court's exercise of that discretion absent a manifest abuse. (*McLellan v. McLellan* (1972) 23 Cal.App.3d 343, 353.) We see no such abuse of discretion here. The cross-complaint accused TAT, through Putney and (to a lesser extent) Egolf, of various acts that undermined the success of *Devices* from 1997 until early 2002, when Solutions acquired the Devices assets. TAT's lawsuit, on the other hand, did not name Devices as a party; it was brought against *Solutions* and its Series B investors for acts occurring in 2004. The court could properly conclude that the causes of action in the first amended cross-complaint belonged with its companion case, in which identical claims were asserted. No error appears on this record.[19]

5. Form of the Recovery from the Transferee Defendants

Appellants next contend that the amounts awarded to TAT and Sands were forbidden by Civil Code section 3439.08, subdivision (b).[20] This provision, part of the Uniform Fraudulent Transfers Act (UFTA), states that a creditor entitled to avoidance of a fraudulent transfer (defined in section 3439.04) "may recover judgment for the value of the asset transferred, as adjusted under subdivision (c),[21] or the amount necessary to satisfy the creditor's claim, whichever is less." According to appellants, the judgment

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[19] *Roylance v. Doelger* (1962) 57 Cal.2d 255, 262, cited by appellants in their reply brief, is not helpful to them. That case involved the striking of a cross-complaint, not the ordering of a separate trial and consolidation with a pending suit on the same issues. The Supreme Court in *Roylance* held that in those circumstances, "the proper procedure is to permit and sustain *filing* of the cross-complaint . . . but to allow the trial court to determine under the provisions of section 1048 whether the issues tendered by the complaint and the answer thereto shall be tried together with those raised by the cross-complaint, or shall be severed." (*Ibid*.)

[20] All further statutory references are to the Civil Code.

[21] When the judgment is based on the value of the asset transferred, subdivision (c) of section 3439.08 provides for adjustment of the amount "as the equities may require."

actually awarded plaintiffs $9,849,523.00, "***far more*** than the [$6,731,307.33] necessary to satisfy their creditors[’] claims."[22] The UFTA, they argue, "does *not* authorize a creditor to invoke both remedies or to collect damages exceeding the value of the disputed asset or debt."

We find no violation of section 3439.08. The judgment against each transferee defendant equals the amount fraudulently transferred (the amount he or she received from Solutions, less the value of that defendant's contribution, according to the jury's verdict), plus pre- and post-judgment interest and costs.[23] The court made it absolutely clear that TAT's total recovery against *all* of the defendants "shall not collectively exceed the amount of $4,460,447.70," plus costs and postjudgment interest; and Sands' total recovery could not exceed $2,135,859.63 plus costs and postjudgment interest. Thus, the judgment in effect awarded no more than "the amount necessary to satisfy [each] creditor's claim," as stated in section 3439.08, subdivision (b).

6. Exclusion of Feldman from the Courtroom

Appellants finally complain that Feldman's due process rights were violated during the trial when he was ordered out of the courtroom and, later, from any part of the courthouse where the jury might see him. As they implicitly recognize, however, a civil litigant's due process right to be present during trial gives way to the court's prerogative

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[22] Appellants maintain that this overcharging of the transferee defendants created immediate harm because "TAT embarked on aggressive enforcement of individual judgments aimed at whomever [*sic*] was not able immediately to obtain appeal bonds and at some who had obtained bonds." The transferee defendants were thus obligated to obtain security pending appeal based on $9 million rather than the $6.7 million to which respondents were entitled under the judgment. Appellants cite nothing in the record to support this factual assertion. The record discloses that each bond obtained by an individual defendant totaled exactly 150 percent of the amount of the judgment against that defendant.

[23] Although prejudgment interest was vigorously disputed below, appellants do not specifically assert error in this aspect of the judgment.

to control disruptive behavior in the courtroom. (See *Helminski v. Ayerst Laboratories, a Div. of American Home Products Corp.* (6th Cir. 1985) 766 F.2d 208, 216-217.) We find no abuse of discretion or constitutional violation.

The behavior leading to Feldman's exclusion started in December 2009, during motions in limine. On December 21 counsel and the court were discussing a limitation on evidence of the financial conditions of the defendants, when Feldman interrupted TAT's attorney, saying, "No. I can't stand it. He's just lying." The court told him to sit down. Shortly thereafter defense counsel, Andrew Castricone, apologized on Feldman's behalf. Before the court adjourned the hearing Feldman himself apologized, saying he was "under a lot of stress."

On April 26, 2010, during cross-examination of Feldman, he was asked about an e-mail correspondence regarding the Kennedy foreclosure. TAT's counsel, Joseph Demko, asked, "The rights to sue National Semiconductor were Devices' rights to sue National Semiconductor. Right?" Feldman answered, "As was the chip. As was everything before Mr. Putney destroyed the company." The court struck this answer, ordered the jurors to disregard it, and excused them for a break. Demko then complained to the court about Feldman's "blatant attempt" to bring before the jury "unclean hands" evidence and the cross-complaint, which the court had previously excluded. "In addition, in front of the jury, Mr. Feldman decided he had to hand Mr. Putney a letter. I haven't opened it. I don't know what theatrics he now wants to engage in. But he's also making huffing and puffing noises; throwing his hands up in the air at rulings, etc. [¶] The theatrics have to stop."[24] Demko firmly believed that Feldman was trying to create a

[24] Later in the hearing Demko stated, apparently referring to the same letter, that it "essentially demands that TAT discontinue pursuing this action because Mr. Feldman has registered TAT Capital Partners with the Secretary of State." In proceedings two days later, Castricone explained to the court that the content of the letter to Putney was similar to one directed to the managing partner in Demko's firm. Castricone's

mistrial. Sands' attorney reported having received a similar letter in the jury's presence. Feldman interjected, "That's not true."[25]

The court then addressed Feldman: "You need to be quiet and sit down. Sit down. Sit down now. *I told you earlier that there would be no outbursts from you. And if there were, I would send you outside.* Do you remember that, during the first phase of the trial, Mr. Feldman? [¶] THE WITNESS: Yes. [¶] THE COURT: Then you need to maintain your behavior. Do you understand that? [¶] THE WITNESS: Yes." Castricone agreed to admonish Feldman, as he had in the past. Feldman, Castricone explained, was "under a great belief that the Court is biased as to . . . himself, his company, his counsel, and [i]n these proceedings." The court also instructed Feldman not to pass anything in the courtroom, except to his attorney.

After further discussion, Castricone apologized for Feldman's "outburst." He again stated that he had admonished Feldman not to introduce any testimony or other evidence that had been excluded and not to communicate with opposing counsel or parties in front of the jury. The court reminded Feldman, "Mr. Feldman, it's really important that we maintain the proper decorum in the courtroom. *There will be no outbursts.* Understood?" (Italics added.) Feldman agreed. The court went through specifics, to which Feldman also agreed-- namely, answer only the questions that are asked, and while testifying, follow the rules and admonitions he had received from his attorney.

Two days later, the court learned that Feldman had been publishing inflammatory statements about the trial proceedings through his Twitter account. Sands' attorney was

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understanding was that the letter included a "cease and desist" demand that TAT stop using the names TAT Capital Partners and TAT Investment Advisory.

[25] Counsel for Sands and Feldman disagreed about whether the jury was present during the passing of this letter.

concerned that a juror might receive communications that Feldman might convert into a mistrial. Defense counsel maintained that Feldman was only asserting his free-speech rights within this very limited medium. He pointed out that there was no gag order in place, and the jurors could simply be reminded of their obligation not to perform any internet searches about the parties or issues in the case. Nevertheless, counsel represented that Feldman had agreed not to post any more comments about the lawsuit. At the end of that day the court elicited an agreement by all counsel that everyone involved in the case would not "tweet, Twitter, blog, whatever"—that is, publish in any form-- any statements about this case until its conclusion. Defense counsel promised to tell Feldman, who was not then present.

On May 5, 2010, Feldman was being cross-examined again, this time regarding his report to shareholders about the initial $29 million jury verdict in the NSC litigation, and Putney's e-mail asking whether TAT would be sharing $15 million in a pro rata distribution. Feldman had previously testified that he had not understood what Putney meant by this question. Demko attempted to impeach him with his deposition testimony, which produced the following colloquy: "[Q.] Do you recall at your deposition you were sworn to tell the truth, just like you were sworn to tell the truth here today and in prior testimony?" [¶] A. Just like Mr. Putney and Mr. Sterling were." The court sustained Demko's objection as nonresponsive.

Continuing his examination later that day, Demko attempted to elicit Feldman's admission that the April 23, 2004 correspondence was part of a series of letters aimed at persuading Putney to sign the Consent Agreement. The court stopped Demko from arguing about documents produced in discovery or anything related to contract formation. All counsel, the court reminded them, had to confine their questions to the credibility of his claim that he did not know there was an agreement to distribute the NSC proceeds pro rata among Devices shareholders. Resuming his examination, Demko confronted Feldman with his deposition testimony regarding his professed intention to pay Devices

shareholders and creditors pro rata.[26] Demko then asked, "You were aware back in 2004 that TAT owned or controlled 21.7 percent of the shares in Devices. Is that correct? [¶] A. They still do. [¶] Q. So the answer is yes? [¶] A. Yes. And I still own 12.3 percent." The court struck this answer as well.

Shortly thereafter Feldman was asked about his June 25, 2004 meeting with Putney. Demko asked Feldman to concede that at this meeting he did not tell Putney that TAT would not receive any portion of the proceeds from the verdict if they were collected. Feldman did not believe he had told that to any Devices shareholder. Demko then queried, "So the answer to my question is I'm correct?" Feldman began to answer, "I don't recall what I told them, since I intended—" Anticipating an explanation pertaining to contract formation and the "admission by silence" defense, Demko then emphasized that he was not asking for Feldman's *intention*; he told him to stop volunteering information, and a sidebar discussion ensued.

After chastising counsel for arguing in front of the jury, the judge told defense counsel that he needed to instruct Feldman "to just answer the question. Because that's been a problem since his first testimony in the first part of the trial." Castricone said he already had.

Demko continued to have difficulty obtaining direct answers to his questions, and the court repeatedly reminded Feldman to "just listen to the question." On May 6, 2010, during a sidebar discussion on redirect, the court instructed Castricone, "I want you to

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[26] In his deposition Feldman was asked about his declaration in the NSC lawsuit, particularly the sentence, "It is my intention to pay [Devices] creditors and shareholders a pro-rata portion of any recovery from NSC from available funds (after deduction of certain costs and expenses) after trial or settlement." Feldman's explanation was that after all costs and expenses, "it would be equal treatment and every shareholder would get [the net amount] if there was anything remaining. If there was an amount, that that amount would be distributed pro rata, based upon people's ownership in ZF Micro Devices."

admonish your client. I don't want him making those outbursts. He's done it before. *I will take him out of here, as I told you before.* He's starting again." (Italics added.) Castricone acknowledged this statement. He insisted that he was respecting the judge's rulings in his questioning of Feldman, but the judge said, "Even if you respect my rulings, your client is not respecting them. And it's your duty to ensure that your client respects them. So you need to control his behavior. [¶] MR. CASTRICONE: As indicated, Your Honor, I have continued to admonish Mr. Feldman regarding just answering the questions; not offering any information; not engaging beyond the question and answer process. [¶] THE COURT: If he's not paying attention to you, and he's not paying attention to the Court, you understand that I can stop him from testifying. I will just stop it. [¶] MR. CASTRICONE: Yes, Your Honor."

The court then instructed the jury that what happened to any Devices shareholder other than the plaintiffs was irrelevant. Feldman then said, "Your Honor, I can't testify any longer." The court responded, "Okay. Then you can step down. Thank you." Instead of quietly resuming his seat, Feldman went on: "This is an unlawful procedure. [¶] THE COURT: You can step down. Thank you. [¶] [Feldman]: I have not been allowed to tell the truth. My rights have been violated. [¶] THE COURT: Deputy, please take him out of the courtroom. Thank you. You are dismissed from the courtroom, Mr. Feldman." The court cut short the proceedings and dismissed the jurors for the day.

Late that afternoon, as the court was about to recess for the day, Demko moved to exclude Feldman from the courtroom from then on. Demko insisted that Feldman was trying to create a mistrial. "And he's going to be back there huffing and puffing and rolling his eyes, and making noises, and putting his hands on his head. [¶] When the jurors left today he was outside crying. . . . And if he can't behave himself, then he shouldn't be on the playing field. He's been in litigation long enough to know the rules.

He's been in enough cases to know the rules. And if he doesn't want to play by those rules, then he shouldn't be allowed in the playing field."

Defense counsel objected and proposed an alternative solution, allowing Feldman to sit in the back of the room, out of the jurors' line of sight while witnesses were testifying. The court spelled out its view of what had led it to this outcome: "Here is the problem. I told him that if there were any further outbursts that he would be excluded from the courtroom. I told him that initially before the jury came, and he said he understood. And I did it again when he had his big outburst outside the presence of the jury. And I reminded him. And I said, *one more time and you're out*. [¶] And not only did he ask to be excused, but he did it in such a manner that he had another outburst. I've admonished him three times or more. You have admonished him over and over again, as you stated on the record. And he doesn't want to listen to me. He doesn't want to listen to you. And so I do think he needs to be excluded at this time."

The next day, before the jurors arrived, Demko expressed concern that Feldman, who was sitting on a bench outside the courtroom, would cause trouble as the jurors passed him on their way inside. The court said, "Does he have to sit there? I don't want him talking to them. I don't want him to create any sort of scene. I know he doesn't listen to you. You said he doesn't listen to you. I'm concerned. You can understand why I'm concerned." Castricone offered to ask Feldman to sit outside another department on the other side of the hall. When the court agreed, Castricone did so, reporting back that Feldman had "reluctantly" moved.

Later that day, while the jurors were out on a break, Demko informed the court that Feldman was "not where he should be. And all the jurors had to parade past [him]." Upon learning that Feldman was talking to his wife outside, the court expressed concern that if he was talking about the trial, the jurors might hear him. At the end of the day, after the jurors left, Demko reported that Feldman was on the first floor where the jurors

had to pass him as they left. Counsel and the court agreed on the best location for Feldman, and the court recessed for the day.

On the record before us, we disagree with TAT's assertion that each of the incidents described above served as a "stand-alon[e] ground" for excluding Feldman. We instead agree with appellants that, considered in isolation, none of the incidents highlighted by plaintiffs would have justified Feldman's being sent out of the jury's presence. But taken together, they were sufficient to convince the trial court that Feldman's repeated violations of its orders could have a prejudicial effect on the jury's consideration of the properly admitted evidence. Feldman had been admonished repeatedly by both the court and his own attorney to refrain from outbursts and unsolicited testimony that violated the court's in limine rulings. The court made sure defense counsel understood that it would stop Feldman from testifying and even exclude him if he could not control himself. Feldman's continued verbal protest after being excused from the stand indicated that he could not.

Appellants cogently describe the emotional stress Feldman was under. But we cannot share his view that the court "poured on the banishments for [his] being obviously upset." Instead, the court was concerned that Feldman's expression of his frustration -- through interruptions of the proceedings, disruptive verbal and nonverbal behavior in front of the jurors, and violations of the court's admonitions -- would confuse the jurors, impair the orderly presentation of evidence, and cause prejudice to the plaintiffs, possibly resulting in a mistrial.

Appellants point out that Feldman's behavior did not involve physical violence, repeated use of profanity, or insulting court personnel. Feldman was "from the start of trial upset and under great stress," but he "didn't ever physically assault anyone or make a threatening movement or gesture. Mr. Feldman didn't ever throw anything, rip anything, or flail or writhe or bite, for heavens' sake. Mr. Feldman uttered not a single offensive word – never called the judge or jurors names, never insulted, mocked and certainly was

never profane." In other words, "Mr. Feldman did nothing that could justify his exclusion from the courtroom, from the hallway near the courtroom and from public places in the public courthouse." Instead, he was only "a corporate CEO of retirement age who watched his life, his company, his beloved sister and all of his investors face horrific financial consequences."

Indisputably Feldman's conduct did not rise to the level of physical and verbal misbehavior exhibited by the defendants in cases appellants have cited for comparison. (See, e.g., *Illinois v. Allen* (1970) 397 U.S. 337, 339, 341 [prisoner properly removed from courtroom after threatening to make a corpse of the judge, continuing to "talk back" to the judge, throwing papers from his file, answering judge's questions with "vile and abusive language"]; *People v. Pena* (1992) 7 Cal.App.4th 1294, 1308 [removal during prosecutor's closing argument justified by outburst and refusal to "shut up anymore"]; *Kulas v. Flores* 255 F.3d 780, 787 (9th Cir. 2001) [no abuse of discretion in removing pro se plaintiff during cross-examination for continued harassment of witness and frivolous objections]; *Badger v. Cardwell* (9th Cir.1978) 587 F.2d 968, 970-971 [self-represented defendant properly removed for baiting judge and raising clenched fist justified exclusion, but not for being argumentative and interrupting judge and prosecutor].) Nevertheless, the manner in which a judge maintains an "appropriate courtroom atmosphere" is a matter within the judge's "considerable discretion." (*Illinois v. Allen*, *supra*, 397 U.S. 337, at p. 343; *People v. Welch* (1999) 20 Cal.4th 701, 774; *People v. Huggin*s (2006) 38 Cal.4th 175, 202.)

"Still further deference is due in this case . . . because we view the evidence from a cold record. [¶] [T]he appellate court is not in as good a position as the trial judge to determine the effect a defendant's disruptive conduct may have had on the proceedings. Even though facial expressions, gestures and other nonverbal conduct are often tremendously significant, they cannot be transcribed by the court reporter." (*Badger v. Cardwell*, *supra*, 587 F.2d at p. 973.) This last point is particularly apposite here,

because a major source of Demko's repeated complaints consisted of Feldman's gestures and vocal expressions while other witnesses were testifying, all of which were beyond transcription by the court reporter.

Having considered all of the events described on the record, and keeping in mind the deferential standard of review to which we are bound, we cannot say as a matter of law that the court abused its discretion in excluding Feldman. Even in criminal proceedings "a defendant can lose his right to be present at trial if, after he has been warned by the judge that he will be removed if he continues his disruptive behavior, he nevertheless insists on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on with him in the courtroom. . . . [¶] It is essential to the proper administration of criminal justice that dignity, order, and decorum be the hallmarks of all court proceedings in our country. The flagrant disregard in the courtroom of elementary standards of proper conduct should not and cannot be tolerated. We believe trial judges confronted with disruptive, contumacious, stubbornly defiant defendants must be given sufficient discretion to meet the circumstances of each case. No one formula for maintaining the appropriate courtroom atmosphere will be best in all situations." (*Illinois v. Allen*, *supra*, 397 U.S. at p. 343; see also *Lane v. Tennessee* (6th Cir. 2003) 315 F.3d 680, 682 [parties in civil litigation "have an analogous due process right to be present in the courtroom and to meaningfully participate in the process unless their exclusion furthers important governmental interests"].) As the conditions created by Feldman warranted his exclusion, the trial court did not abuse its discretion in ordering him removed from the presence of the jury. Accordingly, no violation of his due process rights can be said to have occurred.

Disposition

The judgment is affirmed.

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ELIA, J.

WE CONCUR:

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RUSHING, P. J.

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PREMO, J.